

# European Commission proposal would address distortions caused by foreign subsidies

5 August 2022

## In brief

After a period of negotiations, on 30 June the Council of the European Union and the European Parliament reached political agreement on the [text](#) of a draft regulation on foreign subsidies that, in certain cases, are distorting the internal market (see also our previous [tax policy alert](#) on the initial proposal).

This proposal aims to ensure a level playing field in the internal market. This draft regulation is an important next step that follows the Commission's publication of a White Paper on distortive subsidies in June 2020. The White Paper set out several approaches to address distortive effects caused by foreign subsidies. The proposal is part of the broader EU 2020 industrial strategy driven by the principle of 'enhancing strategic autonomy.'

## In detail

The proposed regulation grants the Commission the power to investigate financial contributions granted by non-EU governmental authorities to undertakings active in the European Union ('foreign subsidy'). Where the Commission believes that a financial contribution has a distortive effect on the internal market, the proposed regulation provides for redressive measures (or commitments by the undertaking concerned). These measures include a repayment of the subsidy by the undertaking to rectify the distortion, reduction of market presence, or divestment of certain assets. Measures added since the original proposals include imposing additional reporting and transparency plus adapting governance structures.

The proposed regulation's definition of 'foreign subsidy' seems close to the definition of State aid. It requires a financial contribution, originating directly or indirectly from the government or specified public body of a non-EU country, that confers a benefit to an undertaking engaged in an economic activity in the internal market, the latter benefit being conferred selectively, in law or in fact. The latest agreed text notes that a foreign subsidy should be regarded as granted from the moment the beneficiary obtains an entitlement to receive the foreign subsidy. The actual disbursement of the foreign subsidy is not a necessary condition for bringing a subsidy within the scope of the regulation. Affected subsidies can take different forms, including.

- I. the transfer of funds or reduction of liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt-to-equity swaps or debt rescheduling;
- II. the forgoing of revenue that is otherwise due, such as tax exemptions or granting special or exclusive rights without adequate remuneration; or
- III. the provision of goods or services or the purchase of goods or services.

In addition, to be in scope the foreign subsidy must distort competition. Potential distortion indicators are set out, but it appears there may be a relatively low threshold; the presumption that total subsidies would be unlikely to distort the internal market if their value is less than €4m over three consecutive years has been reduced from €5m in the original proposal. The draft regulation introduces three tools to assess distortion:

- A notification-based tool to investigate business combinations, referred to as ‘concentrations’ in the regulation. These include mergers, acquisitions and joint ventures, involving a financial contribution by a non-EU government, etc., where the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million, and the transaction involves parties granted foreign financial contributions from any number of non-EU countries of at least €50 million in the previous three years;
- A notification-based tool to investigate bids in public procurements involving a financial contribution by a non-EU government, etc., where the estimated contract value is at least €250 million and the bidder (or various group members or bid subcontractors or suppliers) was granted foreign financial subsidies of at least €4 million per non-EU country in the previous three years; and
- A general tool to investigate all other market situations, where the European Commission can start a review on its own initiative, or it can request an ad-hoc notification for smaller concentrations and public procurement procedures.

Based on the draft regulation, parties will have to notify *ex-ante* financial contributions received from non-EU public authorities three years prior to concluding a concentration or a public procurement procedure above the relevant thresholds. The European Commission can also request ad-hoc notifications for smaller concentrations and public procurement procedures if it suspects the existence of distortive subsidies. Note that pending the European Commission’s review, the concentration in question cannot be completed and the investigated bidder cannot be awarded the contract.

Furthermore, the agreed text contains several new recitals relating to public procurements, and the interaction with the proposed regulation. The draft regulation gives more clarity on how to deal with public procurements for the award of defence and security contracts, framework agreements, and multi-stage procedures.

## The takeaway

The regulation will enter into force once it is formally adopted by the European Council and the European Parliament and published in the Official Journal. The Regulation will become directly applicable across the European Union six months after entry into force. The notification obligations will start to apply nine months after entry into force and appear particularly onerous in relation to concentrations given the broad nature of financial contributions and the relatively low thresholds. Therefore, if adoption occurred at the end of this year, the regulation would likely apply from mid-2023 and the notification obligations would start Q3 2023.

This proposal may increase the regulatory burden for businesses outside the European Union that wish to invest in or otherwise enter the EU internal market. Furthermore, it could lead to increased scrutiny for mergers and acquisitions, and a prolonged public tender process, to name just some of the potential impacts. Potentially impacted businesses should monitor the proposal and consider what further actions may be appropriate if adopted.

## Let's talk

For a deeper discussion of how the draft regulation might affect your business, please contact:

### Tax policy leadership

**Stef van Weeghel**, *Amsterdam*  
+31 0 88 7926 763  
[stef.van.weeghel@pwc.com](mailto:stef.van.weeghel@pwc.com)

**Will Morris**, *Washington*  
+1 202 213 2372  
[william.h.morris@pwc.com](mailto:william.h.morris@pwc.com)

**Edwin Visser**, *Amsterdam*  
+31 0 88 7923 611  
[edwin.visser@pwc.com](mailto:edwin.visser@pwc.com)

### Tax policy contributors

**Jonathan Hare**, *United Kingdom*  
+44 (0) 7740 968 688  
[jonathan.hare@pwc.com](mailto:jonathan.hare@pwc.com)

**Astrid Bauer**, *Germany*  
+49 69 9585 1292  
[astrid.bauer@pwc.com](mailto:astrid.bauer@pwc.com)

**Emmanuel Rainguard de la Bletière**, *France*  
+33 1 5657 4014  
[emmanuel.rainguard@pwcavocats.com](mailto:emmanuel.rainguard@pwcavocats.com)

### Tax policy editors

**Phil Greenfield**, *United Kingdom*  
+44 0 7973 414 521  
[philip.greenfield@pwc.com](mailto:philip.greenfield@pwc.com)

**Chloe O' Hara**, *Ireland*  
+353 87 7211 577  
[chloe.ohara@pwc.com](mailto:chloe.ohara@pwc.com)

**Keetie van der Torren-Jakma**, *Netherlands*  
+31 6 1856 5973  
[keetie.van.der.torren-jakma@pwc.com](mailto:keetie.van.der.torren-jakma@pwc.com)